

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JERRY McGHEE,

Defendant-Appellant.

UNPUBLISHED

October 22, 2002

No. 234024

Wayne Circuit Court

LC No. 00-0011898-01

Before: Murphy, P.J., and Markey and R. S. Gribbs*, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a), involving a twelve year old child. Defendant was sentenced to concurrent terms of five to twenty years' imprisonment. We affirm.

The victim testified that defendant, her mother's boyfriend, sexually assaulted her on three separate occasions and that there was vaginal penetration at least once. Defendant denied all improper contact with the alleged victim and testified he was rarely alone with her. As part of trial strategy, counsel waived testimony from the emergency room physician who treated the victim. Although defense counsel stated an intention to read the physician's medical report into evidence, neither plaintiff nor defendant did so. At the conclusion of the trial, the court ruled: "I believe that young lady [the victim] one hundred percent. I do not believe the defendant."

Defendant argues on appeal that trial counsel was ineffective for failing to introduce the medical report. Defendant believes that if this evidence had been introduced the alleged victim's credibility would have been so significantly damaged that he would not have been convicted.

Because defendant did not request a *Ginther*¹ hearing, this Court's review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish a claim of ineffective assistance of counsel, the burden is on defendant to

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

show that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment and that the deficient performance prejudiced the defense as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel’s conduct was reasonable. *Id.* This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Nor will it assess counsel’s competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant has not shown that the failure to introduce the medical report constituted ineffective assistance of counsel. Even if defense counsel had read the medical report into the trial record, we are not convinced that there is any reasonable probability that the outcome would have been different. The trial court found the victim’s testimony credible and, while the medical report does not specifically support or refute the victim’s version of events, it does emphasize that the victim consistently claimed to have been sexually assaulted. Defendant has not overcome the presumption that counsel’s decision not to read the medical report into the trial record was reasonable, *Mitchell, supra*, and has not shown that his defense was prejudiced .

Affirmed.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ Roman S. Gribbs